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Supreme Court, U.S.
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No. 10-448

In the Supreme Court of the United States

E-L ENTERPRISES, INC.,

Petitioner,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent's extraction of groundwater during sewer construction on an easement next to petitioner's building caused some of the building's wood foundational piles to decay and ultimately fail. Petitioner's use of the commercial real estate was never interrupted, but repairs were required.

Does the Takings Clause of the Fifth Amendment entitle petitioner to recover from respondent the costs of repairing its building?

RULE 29.6 STATEMENT

Respondent, defendant-appellant-petitioner below, is Milwaukee Metropolitan Sewerage District, a special purpose entity organized under Chapter 200 of the Wisconsin Statutes. *See* Wis. Stat. § 200.21, *et seq.* It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner E-L Enterprises, Inc. seeks review of a decision of the Wisconsin Supreme Court holding that consequential damages caused to its building by respondent's sewer construction did not amount to a taking of property. As a threshold matter certiorari is inappropriate in this case because the petition presents no important federal law issue: E-L did not press a federal takings claim in the lower state courts and addressed it only perfunctorily after the Wisconsin Supreme Court ordered the parties to brief the application of federal law; the Wisconsin Supreme Court reversed the lower courts without separately analyzing federal law. What is more, the Wisconsin Supreme Court's ruling that E-L proved only consequential damages to its building does not decide a question of federal law in a way that conflicts with any decision of this Court, a federal court of appeals, or another state court of last resort. This Court has held for over a century that consequential damages do not amount to a taking of property for purposes of the Fifth Amendment. Certiorari should be denied.

COUNTERSTATEMENT

1. This case arises from the District's construction in 1987–1988 of a near-surface collector sewer constructed for the District by an independent contractor. App. 1:5. To construct this sewer, the contractor dug a trench from the surface, installed sewer pipes, and then restored the surface. *Id.*

One portion of the sewer ran next to E-L's building. App. 1:5–6. The building, built in 1928, was constructed on wood piles—long, wooden poles driven into the ground. *Id.* at 1:6. Concrete pile caps were poured on top of the piles, and the caps provided foundational support for the rest of the building. *Id.*

The contractor constructed the sewer in the District's easement under a private alley next to the south wall of E-L's building. *Id.* at 1:5–6. Neither the contractor, the construction trench, nor the District ever entered E-L's property. *Id.* at 1:6 n.8.

When construction approached E-L's building, groundwater entered the trench and interrupted construction. *Id.* at 1:6. Beginning October 26, 1987, the contractor pumped water from the trench for 17 days in order to dry it sufficiently to allow construction to resume under safe conditions. *Id.* Groundwater measurements at the time of construction in 1987 and when the sewer was completed in 1988 showed a groundwater level reduction near E-L's building. *Id.* The levels recovered over the course of the next two years. *Id.*

In 1998, ten years after the sewer was constructed, E-L's owner began monitoring the building's settlement rate. *Id.* In 2001, E-L had an engineer examine the building's foundational piles. *Id.* E-L's engineer determined that the tops of 14 wood piles under the building's south wall (and the first piles north of each corner) had rotted and were no longer able to support the building. *Id.* To repair the problem, damaged portions of these piles were sawed off and replaced with concrete. *Id.*

The repairs ultimately cost $309,388, including attorneys' fees E-L incurred litigating with a neighbor

who obstructed the repair effort by refusing access to his adjacent alley. App. 1:7. E-L continued to lease space in the building throughout the entire period. *Id.*

2. In June 2004, E-L filed this lawsuit against the District and the insurer for the now-defunct contractor. *Id.* E-L principally pleaded negligence and nuisance claims. *Id.* It also pleaded a claim for "inverse condemnation"—effectively a takings claim under Art. I, § 13 of the Wisconsin Constitution—against the District. *Id.*

The contractor's insurer resolved E-L's negligence and nuisance claims against the contractor in a confidential agreement. *Id.* at 1:7 n.9. E-L has refused to disclose the amount it recovered in the settlement.

The trial court dismissed E-L's negligence and nuisance claims against the District under Wis. Stat. § 893.80(4), which affords governmental entities immunity from tort claims based on discretionary conduct. *Id.* at 1:7. The trial court allowed E-L to present its takings claim to a jury. App. 1:9.

The jury found that the District's removal of groundwater was unreasonable and a taking. App. 1:9–10. The special verdict asked the jury whether the District's removal of groundwater caused E-L's building to settle. App. 1:10. The jury answered "yes" and awarded E-L $309,388, the amount of the foundation repairs, plus other incidental repair costs, including attorneys' fees incurred in litigating access rights with the neighbor. *Id.* at 1:10–11.

The District appealed. *Id.* at 1:11. The court of appeals, addressing E-L's takings claim under the state

constitution only, affirmed. App. 2:1–20. It concluded that "this case is on the 'taking' side of the line recognized by *Wisconsin Power & Light* [*Co. v. Columbia County*, 87 N.W.2d 279 (Wis. 1958)]" (App. 2:10) dividing non-compensable governmental damage to property from governmental conduct that constitutes a taking of property (App. 2:7–8).

3. The Wisconsin Supreme Court reversed. The Court explained that two types of governmental conduct can give rise to a compensable taking under the Wisconsin Constitution and the Constitution of the United States—(i) physical occupations or appropriations and (ii) regulatory conduct that approximates a physical occupation because it deprives an owner of all beneficial use of the property. App. 1:14–15 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)).

As the court stated, E-L claimed only that the District physically took its property. App. 1:15–16; *see also* App. 1:16 n.15. But, as the court recognized, "It is undisputed that the Sewerage District did not physically occupy the property for which E-L seeks compensation." *Id.* at 1:33. And, as the court explained, E-L could not claim that the District's conduct deprived "E-L of all, or substantially all, of the beneficial use of its building. . . . The fact that E-L continued to lease the building throughout this entire period is alone sufficient to show that the value of E-L's building was not destroyed for all purposes." App. 1:30–31.

Because E-L proved only damage to its property caused by the District's removal of groundwater on the District's property, the court held that E-L had not demonstrated a compensable taking: "[T]he U.S. Constitution and the Wisconsin Constitution, unlike

the constitutions of other states, provide only that the property of no person shall be 'taken' for public use without just compensation; there is no mention of just compensation for property that is merely 'damaged' for public use." App. 1:25 (footnote omitted). Indeed, as the court stated, "Both the United States Supreme Court and this court have consistently recognized that 'government action outside the owner's property that causes consequential damages within' does not constitute a taking." App. 1:24 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982)). *See also* App. 1:28.

REASONS FOR DENYING THE WRIT

I. This Case Presents a Poor Vehicle to Consider a Federal Takings Law Issue Because E-L Based Its Claim on State Law.

Petitioner did not raise a federal takings law issue in the Wisconsin courts, and none was well developed there. *See* App. 1:2 n.2 ("The issue of whether the Sewerage District's conduct constituted a taking under the U.S. Constitution was not invoked, argued, or appealed below."). The Wisconsin Supreme Court interjected the federal law issue *sua sponte* when, in granting review, it ordered that "the parties' briefs shall address the following additional issue: the applicability of the United States Constitution's provisions regarding takings of property."

E-L had consistently relied only on Wisconsin law in the trial court, the court of appeals, and in opposing the District's petition for review in the Wisconsin Supreme Court. Neither the trial court nor the court of appeals considered the judgment to be one driven by federal law.

E-L's brief in the Wisconsin Supreme Court dealt with federal law only in passing. *See* Brief of Respondent E-L Enterprises, Inc. at 25-30, *E-L Enterprises, Inc. v. Milwaukee Metro. Sewerage Dist.*, 785 N.W.2d 409 (Wis. 2010) (No. 2008AP921), 2009 WL 2761575. And the Wisconsin Supreme Court simply resolved the federal-law issue in tandem with the state constitutional question, belying any claim that the case presents an important federal-law issue that deserves this Court's consideration. *See* App. 1:14–17.

II. The Wisconsin Supreme Court Correctly Applied Settled Law.

A. E-L proved only consequential damages not recoverable as a taking. This Court's Takings Clause jurisprudence has long adhered to the principle that consequential damages from non-invasive government conduct do not amount to "takings": "Operations of the Government . . . oft times inflict serious damage . . . but damage alone gives courts no power to require compensation where there is not an actual taking of property." *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); *see also Bedford v. United States*, 192 U.S. 217, 225 (1904) (no taking where government obstruction of river alleged to cause damage that "was strictly consequential[ ] [and] was the result of the action of the river through a course of years"); *Gibson v. United States*, 166 U.S. 269, 275 (1897) (damage resulting from construction of dike "was not the result of the taking of any part of her property . . . but the incidental consequence of the lawful and proper exercise of a governmental power").

The effects of governmental conduct outside private property—like the District's conduct here—are not takings unless they result in a complete appropriation of private property. For example, "this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation." *Loretto*, 458 U.S. at 428 (citing *United States v. Lynah*, 188 U.S. 445, 468–70 (1903); *Bedford*, 192 U.S. at 225; *United States v. Cress*, 243 U.S. 316, 327–28 (1917); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809–10 (1950)).

Decaying woodpiles—the consequence of lower groundwater levels—is the only property damage or loss E-L proved. While E-L now contends that "its" groundwater was taken, it submitted no evidence of groundwater value. The proof of reduction in "market value" that E-L now argues is a proxy for groundwater value was actually proof of repair costs. As E-L told the jury, "[t]he reduction in the fair market value was what were the repairs that had to be done on this place. And the repairs that had to be done are summarized in Exhibit 51 . . . ." App. 1:19. Exhibit 51, as the Wisconsin Supreme Court correctly recognized, made obvious that E-L proved only consequential damages:

> Exhibit 51, a five-page document titled "Costs to Repair the Valley Business Center [or E-L's building]," is a comprehensive list of the repairs made to E-L's building and the costs thereof. The

> document has a "Detail" list of the repairs made, which includes "Window work," "Foundation, Interior . . . ," "Installed baseboard, etc.," "Electrical work for wall," "Wall repairs," "Demo piping, etc.," and like repairs.

App. 1:19–20 n.17.

B. The decision below and this Court's decisions are in accord. In interpreting the Fifth Amendment's Takings Clause the Court has recognized two types of compensable government conduct: (1) direct government appropriations or physical invasions of private property, and (2) non-invasive regulatory actions that force the owner to suffer a physical invasion or that substantially interfere with the property's use. *Lingle*, 544 U.S. at 537–38. E-L did not demonstrate conduct of either type.

There was no evidence of a direct government appropriation or physical invasion. The District never entered E-L's property, and no regulatory action is at issue. Nor does Wisconsin law grant E-L ownership of the groundwater removed by the District's contractor from the District's property. The controlling Wisconsin decision, *Wisconsin v. Michels Pipeline Construction, Inc.*, allows landowners free use of groundwater on their land but imposes a common-law nuisance duty not to use groundwater on their property in a way that unreasonably harms neighboring properties. 217 N.W.2d 339 (Wis. 1974). *Michels* did not create a property "right" or "interest" in a specific groundwater level; indeed, it refused to adopt the "correlative rights" doctrine of groundwater use allocation among neighboring landowners. *Id.* at 349–50. Thus, under Wisconsin law, the District's misuse of its land in violation of this duty—the most

that E-L has proved—cannot be viewed properly as a "partial" *physical taking* of E-L's property. *See* App. 1:28. E-L did not own the removed groundwater.

And, as the Wisconsin Supreme Court stated, "E-L does not claim that the Sewerage District's diversion of groundwater beneath E-L's building, which reduced the building's structural integrity, rendered E-L's building valueless. E-L cannot so claim because it is undisputed that E-L continued to lease the commercial building throughout this entire period." *Id.* at 1:34–35; *see also id.* at 1:7, 30–31.

C. E-L ignores the last half century of this Court's takings jurisprudence and relies exclusively on *Dugan v. Rank*, 372 U.S. 609 (1963), and *International Paper Co. v. United States*, 282 U.S. 399 (1931), to argue that the Wisconsin Supreme Court's decision conflicts with decisions of this Court. *Dugan* and *International Paper* both involve government appropriation of discernable water rights created by state laws materially different from the Wisconsin law at issue here.

1. *Dugan v. Rank* arose out of a reclamation project that redirected water from the Sacramento River to the San Joaquin River. The project reduced water flow on a section of the San Joaquin. San Joaquin landowners who declined the Government's offer to purchase their California-law riparian rights sued to enjoin the project. *Dugan* held that a district court had improperly enjoined the United States and officials of the United States Bureau of Reclamation from proceeding with the project.

In vacating the injunction, the Court reasoned that the only potentially available remedy was damages "to be measured by the difference in market value of

the [landowners'] land before and after the interference." 372 U.S. at 624–25. But the Court did not rule on the propriety of a water-rights takings claim, stating, "we do not in any way pass upon or indicate any view regarding the validity of respondents' water right claims." *Id.* at 626.

Even *Dugan*'s dicta are not in conflict with the Wisconsin Supreme Court's holding that E-L was not entitled to recover for a taking. As the Wisconsin Supreme Court reasoned, E-L never attempted to prove the value of diminished groundwater. App. 1:17 & 21–22. It proved only consequential damages.

Moreover, whether a property right exists is a state-law question. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2597 (2010). Wisconsin law, as discussed above, does not afford landowners an exclusive right to groundwater or a right to a certain level or amount of groundwater.* Instead, Wisconsin law affords all neighboring landowners the right to use available groundwater and subjects them to possible tort liability if their excessive use interferes with a neighbor's use. *See Michels*, 217 N.W.2d at 350–51. Nothing in *Dugan* suggests that a government en-

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* E-L's suggestion that the Wisconsin Court of Appeals' decision in this case recognized a property right in groundwater is misplaced. The Wisconsin Supreme Court's reversal of that decision deprives it of precedential effect. *See Blum v. 1st Auto & Cas. Ins. Co.*, 786 N.W.2d 78, 88–89 (Wis. 2010) (overruled court of appeals decisions have no precedential effect even on grounds not addressed by the Wisconsin Supreme Court). Moreover, the Wisconsin Supreme Court's *Michels* decision is plainly at odds with E-L's putative groundwater property right, as the Wisconsin Supreme Court explained. *See* App. 1:23–24 n.20.

tity's tortious interference with a neighbor's land use amounts to a taking. Such a holding would transform every governmental nuisance into a taking.

2. *International Paper Co. v. United States* is equally inapposite. During World War I the United States appropriated the total electric power output generated from diverting the Niagara River. 282 U.S. at 404–06. The Power Company, which was authorized by the State of New York to harness the river water, had conveyed to International Paper the right to use part of the diverted water to operate its mill. The Court held that because the Government took all of the water for its own use, it had to compensate International Paper for the loss of its right "to draw . . . 730 cubic feet per second—a right that by the law of New York was a corporeal hereditament and real estate." *Id.* at 405. E-L suffered no similar appropriation of an exclusive right to a specific amount of water.

III. The Wisconsin Supreme Court Did Not Construe Federal Law so as to Conflict With Other Federal or State Decisions.

E-L's effort to manufacture a federal law conflict from decisions of the Sixth Circuit, the Ohio Supreme Court, and the California Supreme Court is unavailing.

In *Hensley v. City of Columbus*, a federal district court had ruled that Ohio law did not afford landowners a property interest in groundwater collected in wells for residential use. The Sixth Circuit certified that question to the Ohio Supreme Court. *Hensley v. City of Columbus*, No. 02-3778, 2004 WL 1152836 (6th Cir. Feb. 20, 2004). The Ohio Supreme

Court answered that under Ohio law title to property includes a right to reasonable use of the groundwater beneath that property. *McNamara v. City of Rittman*, 838 N.E.2d 640 (Ohio 2005). It was not asked to decide the circumstances under which government appropriation or interference with that right would amount to a compensable taking of property under the Fifth Amendment. *See id.* at 646. The Sixth Circuit summarily reversed the district court's ruling and remanded for further proceedings. *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir. 2006).

On remand, the district court held that the plaintiffs' takings claims were time-barred and granted summary judgment. *Hensley v. City of Columbus*, No. 2:99-CV-888, 2007 WL 2902943 (S.D. Ohio Oct. 1, 2007). The Sixth Circuit affirmed. 557 F.3d 693 (6th Cir. 2009). Neither court considered the merits of plaintiffs' claim that the Fifth Amendment required the City of Columbus to compensate them for "dewatering" their drinking-water wells.

The inchoate takings issue that these decisions left unresolved is materially different from the one that E-L makes here. Whereas E-L claims injury caused by removal of groundwater passively surrounding its foundation piles, the Ohio plaintiffs sought compensation for the removal of groundwater captured in domestic wells for private consumption. *See McNamara*, 838 N.E.2d at 642. Ohio law, moreover, embraces the very correlative rights approach to groundwater that Wisconsin law has rejected. *Compare Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984) (adopting 4 RESTATEMENT OF THE LAW (SECOND) OF TORTS § 858(1)(b)'s protection from another's "withdrawal of ground water exceed[ing] the proprietor's share of the annual supply or total

store of ground water"), with *Michels*, 217 N.W.2d at 349–51 (rejecting correlative rights rule and adopting draft RESTATEMENT § 858A, which lacked the provision included in § 858(1)(b)).

E-L's reliance on the California Supreme Court's decision in *Collier v. Merced Irrigation District* underscores the lack of a true conflict on any important federal law issue. 2 P.2d 790 (Cal. 1931). At issue in *Collier* was whether article 1, § 14 of the California constitution, which provided that private property "shall not be taken *or damaged* for public use without just compensation" (*id.* at 796 (emphasis added)), required that the defendant-irrigation district compensate the plaintiff-landowner when the district's dam eliminated the flow of stream water the plaintiff had relied on for irrigation. *Id.* at 794–96. The 79-year-old *Collier* decision thus involves application of a materially different state constitutional provision to materially different state-law property rights in the context of materially different facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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